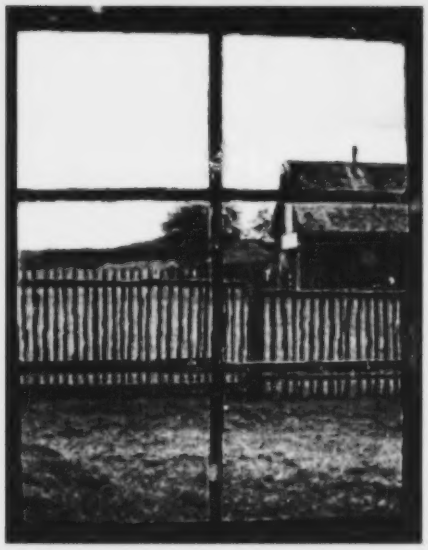
2004



ANNUAL REPORT

Office of the Ombudsman and Information & Privacy Commissioner

YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

January 1 to December 31, 2004

106-06413/

Office of the Ombudsman and Information & Privacy Commissioner

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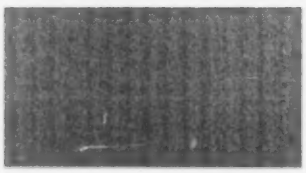
Photos are from Fort Selkirk, located where the Pelly and Yukon River systems meet. Stone tools discovered nearby have been dated at 8,000 to 10,000 years old. The area was an important fishing and hunting location of the Northern Tutchone people of the lower Pelly region. In 1848, Robert Campbell descended the Pelly River to establish a Hudson's Bay Company trading post at the river's mouth, and named the site Fort Selkirk. Over the years it became a transportation and communications hub and home for missionaries, the Northwest Mounted Police, the Yukon Field Force, the Selkirk First Nations people, trappers and traders. Since 1984 the Yukon government's Heritage Branch and the Selkirk First Nation have been working together to preserve, develop and interpret the site for all Yukoners and visitors. For more information visit http://www.virtualmuseum.ca/Exhibitions/FortSelkirk/english/index.html.

Translation to French was done by Angélique Bernard
Revision of French was done by Chantal Le Corvec



Ombudsman

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YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

December 2005

The Honourable Ted Staffen
Speaker of the Legislative Assembly
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Mr. Speaker:

I have the pleasure of presenting to you, and through you to the Legislative Assembly, the Annual Report of the Yukon Ombudsman and Information & Privacy Commissioner.

This report is submitted pursuant to Section 31(1), *Ombudsman Act* and Section 47(1), *Access to Information and Protection of Privacy Act*. The report covers the activities of the Office of the Ombudsman and the Information & Privacy Commissioner for the period January 1, 2004 to December 31, 2004.

Yours truly,

H Moorlag.

Hank Moorlag
Ombudsman

Mission Statement

To provide an independent, impartial means by which public complaints concerning the Government of Yukon can be heard and investigated under the *Ombudsman Act.*

To provide an effective avenue for receiving and processing public complaints and requests for the review of decisions by public bodies related to the *Access to Information and Protection of Privacy Act.*

To promote fairness, openness and accountability in public administration.

The Function of the Ombudsman

The function of the Ombudsman is to ensure fairness and accountability in public administration in the Yukon.

The Ombudsman fulfills this function by receiving complaints, conducting an impartial and confidential investigation and, when warranted, recommending a fair and appropriate remedy.

The Ombudsman is not government but investigates government. The Ombudsman can recommend that an authority resolve administrative unfairness, but cannot make it change its actions or decisions. The Ombudsman receives complaints from individuals and groups but is not their advocate.

The *Ombudsman Act* provides the statutory framework under which the Ombudsman carries out his function.

The Yukon Ombudsman has jurisdiction to investigate complaints about the actions, decisions, recommendations or procedures of the following:

- Departments of the Yukon Territorial Government.
- Crown corporations and independent authorities or boards.
- Public schools and Yukon College.
- Hospitals, local and regional health bodies, and governing bodies of professional organizations.
- Municipalities and Yukon First Nations governments if requested by a municipality or First Nation.

The Ombudsman does not have the authority to investigate the following:

- Complaints about actions which occurred prior to July 1996 when the *Ombudsman Act* became law.
- Complaints about the courts, the Yukon Legislature, the Yukon Elections Office, or lawyers acting on behalf of the Yukon Territorial Government.
- Disputes between individuals.
- Complaints against the federal government.
- Complaints for which there is a statutory right of appeal or review.

The Ombudsman's office is an office of last resort. This means the Ombudsman encourages any complainant to raise his or her complaint with the authority first and then to come to the office if that route is unsuccessful.

Ombudsman's Message

The *Ombudsman Act* requires a report to be presented annually to the Legislative Assembly on the affairs of the office. This report summarizes the activities of the office and provides some observations on the extent to which the purposes of the legislation are being met. Through the annual report, the office is able to inform the Legislative Assembly on its work throughout the year. I also recognize the unique opportunity to offer government departments and agencies some important comments on administrative fairness and to educate the public on the role and function of the Ombudsman.

The format of this year's annual report, as in past years, includes a statistical summary of complaints received, highlights of cases through a discussion of the issues they present, and comments from the year's experience on how public administration can be improved.

The office handled 72 complaints in 2004. Of these complaints, 14 were investigated and the rest were resolved as shown in the statistical summary on page 10.

Administrative fairness is a term used to define a standard by which decision makers meet the duty to act fairly.

Not surprisingly, much of the office's work relates to complaints from people who believe that, in one way or another, they were not dealt with fairly. One aspect of investigations therefore examines what standards of fairness apply. Administrative fairness is a term used to define a standard, in public administration, by which decision makers meet the duty to act fairly. In coming to a conclusion after investigation, it is not a purely subjective assessment on the part of the Ombudsman. Fairness standards have evolved through the courts to ensure the decisions of administrative bodies are based on a fair process. These are also reflected in section 23 of the *Ombudsman Act* as the grounds upon which the Ombudsman may make a report and recommendations. Two cases are described in this report where assessments were made about administrative fairness.

Complaints frequently include concerns about unreasonable delay. Our investigations reveal that public officials are often not in the practice of acknowledging the receipt of correspondence and indicating a time frame within which a response can be expected. Instead, the correspondence is placed on file and assigned to someone who then fits it in with other workload priorities. As a result, complainants feel ignored and frustrated.

In most situations, when the authority is notified of the complaint the delay is rectified. This usually settles the immediate problem of the complainant. However, our investigation file is not closed without deciding whether the administrative practices that led to the delay should be examined with a view to preventing a recurrence. One case is highlighted in this report where such an examination led to appropriate changes to the internal complaint handling process at the Whitehorse Correctional Centre.

The common approach to investigating a complaint is to examine the relevant legislation, policy, practices and conventions. In other words, is there a typical and standard process involved and how do the circumstances giving rise to the complaint differ from this? If there is a departure from the normal process, can it be explained? This approach makes no assumptions at the outset, which is an important characteristic of an independent Ombudsman investigation. An important step in receiving public complaints is to emphasize the office's independence at the outset.

Often complainants have an expectation that the Ombudsman will act as their advocate in dealing with their complaint. To them, this means I should accept their version of the facts and confirm their conclusion through investigation. At the time a complaint is received, it is sometimes difficult for a complainant to accept that there may be a possibility the Ombudsman will come to a different conclusion on some aspect of the complaint. One case is discussed in this report where the complainant's expectations were not met because the evidence did not support further action.

In my Annual Report for 2003 I commented on the fact that ineffective communication is a recurring theme of complaints coming to my office. I offered three steps government can take towards making a positive shift:

- Develop within departments a complaint handling process that is oriented to improving program delivery and public administration in response to public complaints.

- Train public servants to deal with conflict in productive ways and to offer training programs based on an assessment of operational requirements.

- Introduce Corporate Value Statements that can be modeled or adopted by public servants as an alternative to defensive and dismissive personal responses to criticism.

I offered the assistance of my office as a resource to departments in the development of internal complaint mechanisms, and referenced a guideline developed by the British Columbia Ombudsman. To the time of this report going to print there has been no response from government on my suggestions, so I have repeated them here in the hopes they be given consideration and that I might be advised about whether they merit acceptance.

Within the past year I adopted the practice of meeting with individual deputy ministers as a means of fostering and maintaining the kind of working relationship that maximizes our ability to settle complaints informally. In these meetings we discuss the purpose of section 15 of the *Ombudsman Act* which is to seek opportunities for early settlement. This means that at any time during investigation options can be explored for settling a complaint without having to consider formal recommendations from the Ombudsman after the investigative process.

I am pleased to report that deputy ministers and senior officials are recognizing the benefits of early settlement and are initiating the discussions, or have been very open to suggestions which will lead to informal resolution. As a result, very few investigations are now going through the formal process set out in the *Act* that involve the negotiation of recommendations after a full investigation.

15(2) The Ombudsman may at any time during or after an investigation consult with an authority to attempt to settle the complaint, or for any other purpose.

Ombudsman Issues

Unreasonable delay

Under the *Ombudsman Act* the Ombudsman may investigate whether there is unreasonable delay by an authority in dealing with a particular matter. After investigation, if the Ombudsman believes there was unreasonable delay, he may recommend corrective action to settle the complaint. The Ombudsman may also recommend changes to administrative practice to prevent a recurrence.

When notified of the complaint, an authority often rectifies the delay by doing what ought to have been done before the complaint to the Ombudsman was made. The Ombudsman then determines if there is any benefit to the complainant in continuing the investigation. Some investigations have been concluded in such circumstances, because the delay has been explained and resolved. In other cases, however, the Ombudsman continues the investigation in order to uncover the reasons for the delay and, where appropriate, recommend changes to administrative procedures or practices, so that similar delays will be avoided in the future.

... the assumption is that if the procedure is fair, the ultimate decision rendered is also likely to be fair.

As one example, the Ombudsman received a complaint from an inmate at the Whitehorse Correctional Centre who experienced unreasonable delay when appealing a decision that denied him certain visiting privileges. The Superintendent of the Centre included the following comment during the process of settling the complaint under section 15 of the *Ombudsman Act*: "Inmates have the legal right to a clear process for making requests, and having those requests heard in a timely fashion. As you know, our process for handling inmate requests has been the occasional subject of complaints to your office. However, with input from your office, the changes we've made to the form and the tracking process should help to alleviate similar problems in the future." This acknowledgment of the right to a fair and timely process, and a willingness to make changes to administrative practices, settled the complaint.

Administrative fairness

The concept of administrative fairness is based on the recognition of "natural justice" or "procedural fairness," which has evolved through the courts to ensure the decisions of administrative bodies are made fairly. What is often referred to as the rules of natural justice is a set of fairness standards which administrative decision makers must follow when making decisions. Today, these fairness rules are included in the duties to act fairly imposed on administrative tribunals.

The fairness rules apply to the procedures followed in arriving at a decision, not necessarily the substance or merits of the decision itself. However, the assumption is that if the procedure is fair, the ultimate decision rendered is also likely to be fair.

Occasionally, despite a *correct* decision by an authority, the person affected still finds the decision unfair. A case in point is the complaint of a person who was denied reimbursement for medical travel. The person required semi-annual visits for specialized attention in Vancouver. Before one of the scheduled visits, the complainant was already in BC on a personal matter. As the time drew near, the complainant telephoned the Department and enquired about travel arrangements. The staff member thought the call was coming from Whitehorse, and proceeded to book the travel. It was learned later that the person was planning to

attend an appointment in Vancouver without first returning to Whitehorse. After some consideration about whether the return portion of the trip could be authorized, the decision was made to cancel the booking and not pay for any part of the travel.

What the person was seeking, and what the medical travel regulations do not permit, is for the person's travel from Vancouver to Whitehorse, following a medical appointment, to be paid at public expense. The applicable regulations require medical travel to originate within the Yukon. The Ombudsman accepted the authority's interpretation that the purpose of this limiting provision is to prevent a subsidized medical travel benefit from becoming a subsidized personal travel benefit. In other words, if a person is already outside the Yukon for personal reasons, their return travel cannot be paid under the medical travel regulations. This is even when they receive the kind of medical care while 'outside' that would normally be eligible for a medical travel subsidy from within the Yukon. The Ombudsman concluded there was no obligation on the authority to pay for any portion of the travel.

Despite a conclusion that the decision was the correct one, the Ombudsman wrote to the authority expressing concern about the administration of the program, because the investigation revealed uncertainty among departmental officials about whether the complainant's travel request could be accommodated in whole or in part. The complainant believed the regulations stipulated a requirement to return to Whitehorse prior to medical travel to Vancouver, which seemed unreasonable, since the person was already in BC. The department failed to clearly explain the eligibility criteria, and this led to the complainant's expectation that the travel, or some part of it, could be paid. The Ombudsman's observations were conveyed to the authority, in the hopes they might be helpful in the Department's own review of the case and in identifying opportunities for strengthening the administration of the Medical Travel Program.

Policy compliance

The Yukon Government has a Workplace Harassment Policy in place. The purpose of this policy is to establish a workplace that does not tolerate harassment. The policy defines harassment as including personal harassment, sexual harassment, and abuse of authority. A committee, set up under the policy, investigates harassment complaints. Following investigation, if the committee finds harassment, an obligation is placed on the Deputy Minister of the Department, described in the policy as the 'senior official', to take action. The senior official, after consulting with the Public Service Commission (PSC), must "render a decision on the substantiated complaint, for appropriate remedy or discipline." This decision, according to the policy, must normally be rendered within ten working days of receiving the report.

The Ombudsman received a complaint in which the Workplace Harassment Policy had not been followed. The investigation revealed that the senior official, who received the report with its finding of harassment, did not:

- respond within the time frame set by the policy and did not resolve the issue without delay;
- did not render a decision on the appropriate remedy within the time frame required;
- failed to provide adequate training to department personnel;
- breached the confidentiality required during an investigation; and
- failed to address the issue of a safe environment during and after the investigation.

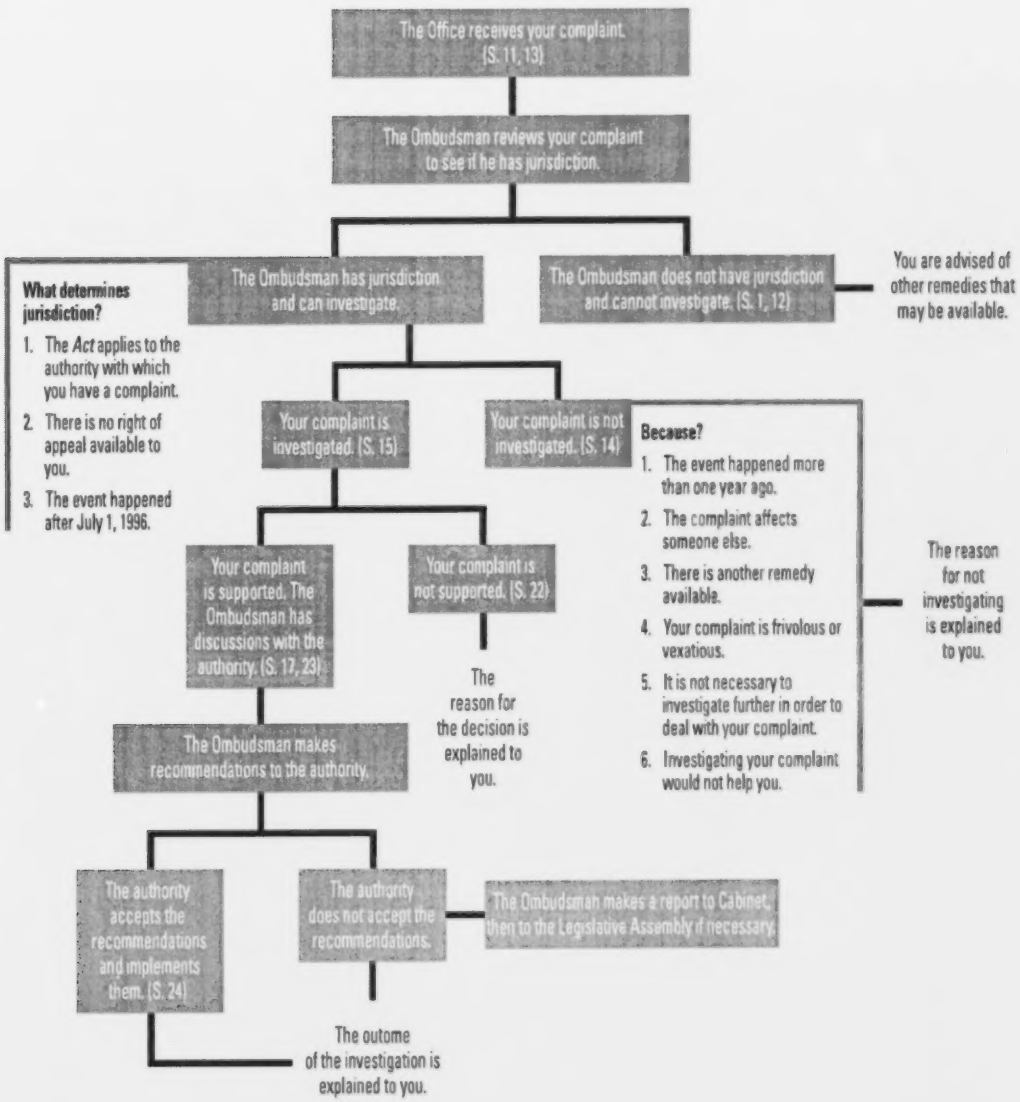
The combined result led to the Ombudsman's conclusion that there had been administrative negligence, meaning that the authority had neglected its responsibility to properly follow up on a finding of harassment.

During the course of the Ombudsman's investigation, the Public Service Commission modified the process and practices used in conducting an investigation and in reporting and resolving complaints under the policy. Nevertheless, the Ombudsman made three additional recommendations to further strengthen the policy and procedures. The Commission accepted these recommendations.

The Ombudsman also considered whether the authority should be asked to take further steps to address the impact of the events on the complainant's reputation in the workplace. The Deputy Minister had already sent a letter to the complainant apologizing and giving an explanation for the delay in taking action. The letter also expressed confidence in the complainant's work knowledge and skills, and it confirmed the complainant's work performance met or exceeded expectations. The Ombudsman felt this letter would address any questions that may arise about the complainant's work performance.

Following the Ombudsman's report to the complainant on the results of the investigation, the complainant felt the Ombudsman should have made further recommendations to the department regarding workplace redress under the policy. The Ombudsman further reviewed the case facts and concluded the circumstances did not require additional recommendations, because the investigation did not reveal any evidence showing that the complainant's reputation and relationships with others in the workplace had been adversely affected. In fact, the investigation revealed the complainant was highly regarded by co-workers.

Ombudsman Flow Chart of Complaints


The Office receives your complaint. (S. 11, 13)
The Ombudsman reviews your complaint to see if he has jurisdiction.
What determines jurisdiction?
1. The Act applies to the authority with which you have a complaint.
2. There is no right of appeal available to you.
3. The event happened after July 1, 1996.
The Ombudsman has jurisdiction and can investigate.
The Ombudsman does not have jurisdiction and cannot investigate. (S. 1, 12)
You are advised of other remedies that may be available.
Your complaint is investigated. (S. 15)
Your complaint is not investigated. (S. 14)
Because?
1. The event happened more than one year ago.
2. The complaint affects someone else.
3. There is another remedy available.
4. Your complaint is frivolous or vexatious.
5. It is not necessary to investigate further in order to deal with your complaint.
6. Investigating your complaint would not help you.
The reason for not investigating is explained to you.
Your complaint is supported. The Ombudsman has discussions with the authority. (S. 17, 23)
Your complaint is not supported. (S. 22)
The reason for the decision is explained to you.
The Ombudsman makes recommendations to the authority.
The authority accepts the recommendations and implements them. (S. 24)
The authority does not accept the recommendations.
The Ombudsman makes a report to Cabinet, then to the Legislative Assembly if necessary.
The outome of the investigation is explained to you.

Statistical Summaries

JURISDICTIONAL FILES HANDLED IN 2004	
Brought forward from 2003	18
investigations	16
not yet analyzed	2
Received in 2004	70
TOTAL	**88**
Completed in 2004	65
Carried over to 2005	23
investigations	21
not yet analyzed	2

RESOLUTION OF JURISDICTIONAL COMPLAINTS RECEIVED IN 2004	
Opened as investigation	14
Referred to another remedy	30
Further investigation not necessary	6
Insufficient information provided	4
No benefit for complainant in investigating	2
Complaint withdrawn	1
Otherwise resolved	7
Legislated appeal exists	3
Occurred before July 1, 1996	1
Not yet analyzed	2
TOTAL	**70**

INVESTIGATIONS HANDLED IN 2004	
Brought forward from 2003	16
Opened in 2004	16
analyzed in 2004	14
not yet analyzed in 2003	2
TOTAL	**32**
Completed in 2004	11
Carried over to 2005	21

OUTCOME OF INVESTIGATIONS COMPLETED IN 2004	
Complaint substantiated after investigation	2
Complaint partially substantiated after investigation	3
Complaint not substantiated after investigation	2
Complaint discontinued	3
Complaint settled	1
TOTAL	**11**

NON-JURISDICTIONAL COMPLAINTS	
Businesses	12
Courts	4
Federal	5
Other	1
RCMP	3
YTG	1
Not an authority	2
TOTAL	**28**

These requests often require time to research before being referred to other agencies for assistance.

COMPLAINTS RECEIVED IN 2004 — BY AUTHORITY

AUTHORITY	OPENED AS INVESTIGATION	NOT OPENED AS INVESTIGATION	NOT ANALYZED	TOTAL
Community Services	—	3	—	3
Education	—	3	1	4
Finance	1	—	—	1
Health and Social Services	3	9	1	13
Highways and Public Works	1	3	—	4
Justice	1	2	—	3
Public Service Commission	—	1	—	1
Social Assistance Appeal Board	1	—	—	1
Whitehorse Correctional Centre	3	20	—	23
Whitehorse Housing Authority	—	1	—	1
Yukon Housing Corporation	1	3	—	4
Yukon Legal Services Society	1	—	—	1
Yukon Workers' Compensation Health & Safety Board	2	9	—	11
TOTAL	**14**	**54**	**2**	**70**

OMBUDSMAN REQUESTS FOR INFORMATION

TOTAL	**108**

Requests for information often require time to research.

The Function of the Information and Privacy Commissioner

The primary purpose of the *Access to Information and Protection of Privacy Act* (the *Act*) is to make departments and agencies of government (public bodies) more accountable to the public and to protect personal privacy. The *Act* does so in a number of ways:

- By giving the public a right of access to records.
- By giving individuals a right of access to, and a right to request correction of, personal information about themselves.
- By specifying limited exceptions to the rights of access.
- By preventing the unauthorized collection, use and disclosure of personal information.
- By providing for an independent review of decisions made under the *Act*.

The office of the Information and Privacy Commissioner carries out these independent reviews. However, the right to a formal review by the Commissioner is limited to the following decisions made under the *Act*:

- A refusal to grant access to a requested record.
- A decision to separate or obliterate information from a requested record.
- A decision about an extension of time for responding to a request for access to a record.
- A decision to deny a request for a waiver of a fee imposed under the *Act*.

There is also a right of review if a person believes his or her personal information was collected, used or disclosed by a public body in a way that was contrary to the requirements of the *Act*.

A supplementary provision of the *Act* gives the Commissioner responsibility for monitoring how the *Act* is administered to ensure its purposes are achieved. The Commissioner may, among other things, receive complaints or comments from the public concerning the administration of the *Act*, conduct investigations into those complaints, and make reports. The Commissioner may also comment on the implications for access to information or for privacy protection of existing or proposed legislative schemes or programs of public bodies.

"Administration of the Act" refers to anything done by the Records Manager, a public body, or the Information and Privacy Commissioner, to meet the requirements of the Act.

Commissioner's Message

In my last Annual Report, I spoke about the importance of making a general assessment of the extent to which the purposes of the *Access to Information and Protection of Privacy Act* have been embraced by public bodies, and how those purposes have been given effect so government is more open and accountable to the public it serves. In that assessment, I expressed some serious concerns and set out a number of changes that, if implemented, would lead to a real and noticeable difference in meeting the government's objective of openness and transparency as expressed in the purpose of this legislation.

... an expectation that information will be disclosed unless there is a clear and compelling reason not to do so.

I am not alone, as Information and Privacy Commissioner, in calling for changes that will lead to more openness and accountability on the part of government. In her 2003 Annual Report, Ontario's Information and Privacy Commissioner commented on the newly elected government of Ontario's stated commitment to transparency in its first throne speech, and that it was an important symbolic first step toward a new culture of openness in Ontario. As part of the Commissioner's "Blueprint for Action", Commissioner Ann Cavoukian called on the Premier to go further by issuing an open letter to all ministers and deputy ministers, setting out an expectation that information will be disclosed unless there is a clear and compelling reason not to do so.

In her 2004 Annual Report, Commissioner Cavoukian expressed her pleasure at Premier McGuinty's response. Within hours of the release of the Commissioner's 2003 Annual Report, the Premier issued a memorandum to all ministers and deputy ministers calling upon them, "to strive to provide a more open and transparent government." The memorandum, as well as a follow-up memorandum from the Management Board Chair and the Attorney General, are considered by the Commissioner to be "seminal documents in a public policy culture shift, and will play a crucial role in ushering in a new era of openness." Further information about these annual reports as well as progress in response to the "Blueprint for Action" can be found on-line at http://www.ipc.on.ca.

In his 2003 Annual Report, Manitoba Ombudsman Barry Tuckett emphasized that access to information and protection of privacy are fundamental rights in open, accountable, and modern democratic governments. His observation was that there does not appear to be a culture of openness across public bodies of the Manitoba government. He stated: "Achieving this requires that there be a commitment from the top to the province's access and privacy laws." He went on to make a number of recommendations to bring about positive change.

British Columbia's Commissioner David Loukidelis made the following comments in his 2003-04 Annual Report under the heading "Our public sector access and privacy work still challenges us":

> *Any decade-old law is likely to need some fine-tuning in light of hard-learned lessons and changing conditions. ... A number of our recommendations were aimed at improving our ability to function efficiently in overseeing compliance with the legislation, but many were intended to enhance openness, accountability and privacy protection. ... Those recommendations must all be implemented if our legislation is to remain an effective force for public body accountability and privacy protection for British Columbians.*

Similar appeals can be found in all the annual reports of Canada's Information and Privacy Commissioners. They all underline the fact that this is not a static piece of legislation to which government can respond with a minimum level of compliance. It must form the basis for public policy on the transparency of program delivery and the openness of government records. Experience in working with the legislation will determine where there are weaknesses and what improvements can be made to further its intent. This is why the legislation provides for periodic reviews in other Canadian jurisdictions.

Since I did not receive a response to the comments in my last annual report, I must repeat my concerns and urge government to move forward with the recommended changes, which are itemized on page 26.

In this report I also discuss the need for amendments to the *ATIPP Act*. Since October, 2000, I have continued to press for an amendment to clarify the definition of a 'public body' under the *Act*. The current definition includes boards, commissions, foundations, corporations or other similar agencies, but only if they are established or incorporated as "an agent of the Government of the Yukon". The Yukon Court of Appeal interpreted this term to mean that if such an agency's primary function is to make decisions that are free of the government's direction or control, it is not an agent of the Government of the Yukon and therefore not a public body under the *Act*. (*Yukon Medical Council v. Yukon (Information and Privacy Commissioner)*, 2001 YKSC 531. Decision of June 28, 2001)

Applying the reasoning of the Yukon Court of Appeal essentially excludes all boards, commissions and other such agencies from the *Act* because virtually all of them are created for the express purpose of making decisions that are free of government influence. This excludes such agencies as the Yukon Workers' Compensation Health and Safety Board, the Yukon Utilities Board, the Yukon Mental Health Review Board, and the Yukon Public Service Staff Relations Board, to name a few; all agencies that were previously considered to be within the scope of the *Act*.

Because the *Act* specifically includes, in paragraph (b) of the definition of a 'public body' boards, commissions and other agencies, the legislature could not possibly have intended to render paragraph (b) meaningless with the qualifier that they be an agent of the Government of the Yukon. Using the Court's interpretation, these agencies are at once included and excluded in the same sentence, creating an oxymoron — conjoining contradictory terms.

The government's response to my October 2000 request for a legislative amendment has consistently been that this needs to be included in a full review of the *ATIPP Act*. I tend to agree. However, the review has not taken place, nor is it expected in the identifiable future. On May 12, 2005, the Minister responsible for the *Act* stated in the legislature that in the short term the government will focus on non-legislative options. In the longer term, " ... the government will continue to develop a plan for the future review of the *Act*."

The definition of a 'public body' affects the scope and reach of the *Act*, and the present problem cannot be dealt with by non-legislative options. The effect this has on the administration of the *Act* is significant. Boards, commissions and agencies that participate with government in the delivery of public services and programs are not bound by a common standard of fair information practices, nor are they obligated to adopt the principles of openness and accountability expressed in the *Act*. This makes it difficult for government departments to share information with their partner agencies because there is not a common standard for handling the information.

The legislation must form the basis for public policy on the transparency of program delivery and the openness of government records.

Federal private sector legislation now requires all businesses in Canada to follow rules for the protection of personal privacy. Some provinces have enacted their own laws for privacy protection in the private sector. Some have also brought in separate legislation for the protection of personal health information, or have expanded the public sector legislation to cover all custodians of personal health information. Thus, in most other Canadian jurisdictions, privacy protection and rules for fair information practices have general application to all activities in both the public and private sector. The Yukon is failing to keep pace with these developments.

Governments do not operate in isolation. Programs and services, particularly in the health field, are integrated. With emerging technology there is enormous pressure to move information and share data for the purpose of delivering services more efficiently and in more cost-effective ways. For example, federal health initiatives include the creation of electronic health records as a means to deliver better health care. A privacy protection framework for this initiative is essential. Other Canadian jurisdictions are enacting legislation or expanding existing legislation to accommodate these changes.

The scope and reach of the *ATIPP Act* presently falls well short of enabling protocol agreements between the Yukon Government and other agencies that involve the handling of personal information, because there is not a shared common standard for openness, accountability and the protection of personal privacy.

In my view, an amendment to the definition of a 'public body' under the *ATIPP Act* is urgently needed. It should not be further delayed pending a full review of the *Act*.

Review and Comment on Programs and Legislation

Whitehorse Correctional Centre — Inmate Profile Form

The Whitehorse Correctional Centre asked the Information and Privacy Commissioner to review and comment on a newly introduced Inmate Profile form.

The form was developed out of a need to improve the management of information contained in inmate files. Past practice was to keep inmate files in the front office accessible to all WCC staff. The files also contained information for the purpose of developing a probation case management plan. Therefore, WCC information necessary for program delivery while an inmate was at the facility, was combined with information related to Adult Probations programming. The change now means this information will be separated and accessible only to those who require access for purposes that are consistent with the reasons/authority for which the information was collected.

The only information now available to WCC staff is the information contained in the Inmate Profile. If there is a need to have access to more information about an inmate for legitimate program delivery purposes, the staff member will go to the inmate's case manager.

Almost all the information contained in the inmate profile will be entered on the form in the presence of the inmate on intake. The only information that will be entered in the absence of the inmate will be the medical summary, completed by the Nursing Staff, and updating information related to behavioural issues and program participation. On request, the inmate will have access to this form at any time by way of routine disclosure.

The Commissioner's review involved an explanation by the Superintendent of each entry on the form. Each of the data elements was discussed in the context of compliance with sections 29 to 39 of the *ATIPP Act*, in general terms. Properly completed, the form would contain only as much personal information as is necessary for WCC staff to discharge program responsibility, and its use is limited to the purposes for which the information was collected. Hard copies and electronic copies of the record are to be secured appropriately.

The review raised no concerns by the Commissioner. The Superintendent was commended for addressing this particular issue by taking into consideration the privacy protection provisions of the *ATIPP Act* on collection, use and disclosure.

Fees under the *ATIPP Act* and Regulations

The Deputy Minister of Health and Social Services raised a question about the administration of the *Act* as it relates to the fees that may be charged to an applicant for responding to a request for access to records.

In this case, the department gave the applicant an estimate of the cost involved in searching for and preparing the responsive records for disclosure. The applicant agreed to pay the fee quoted by the department. However, after the department had expended considerable time and resources, the applicant notified the department that the request was being abandoned. No payment was made by the applicant for the work done.

42. In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is responsible for monitoring how this *Act* is administered to ensure that its purposes are achieved ...

The Commissioner reviewed this case in order to determine if these circumstances point to a shortcoming in either the legislation or in how the *Act* is administered.

The regulations permit public bodies to request an advance on fees. In this case the public body did not ask for such an advance. The Commissioner noted with interest that the Alberta regulatory scheme actually requires public bodies to collect 50% of the fees up front on any fee estimate in excess of $150.

The *ATIPP Act* regulations state the Records Manager may request an applicant to pay some or all of the estimated fee before processing the request. It is currently a discretionary decision that may be applied in one case and not the other, leaving it open to criticism that it is applied inconsistently or unfairly. The Commissioner did not suggest the Yukon should follow the practice in Alberta. However, he commented that it would benefit the administration of the *Act* if a policy for the exercise of this discretionary authority is implemented. Such a policy would likely avoid the problem encountered with the current case, and ensure decisions are applied consistently by all public bodies.

Information and Privacy Issues

Clarifying complex requests for access

ATIPP applications are sometimes made on behalf of individuals in an attempt to identify information that might support legal proceedings. In multiple client actions for people who have had many dealings with government agencies, a high volume of records may be involved and they may contain many references to third parties.

Access requests generated in this manner often seek all of an applicant's information on file, may involve searches of the records held by several branches of a public body, and frequently require the review of a large number of documents. This can require a major commitment of time on behalf of the public body and may result in the production of a large number of records could well exceed the scope of the applicant's request.

One application of this nature in 2004 led to meetings between the public body and representatives of the applicant to explore how such requests could be most efficiently handled. Discussion led to recognition on both sides that any possible clarification of the request might help to focus the search and produce results more quickly.

The same application was also the subject of review because some third party personal information was separated or obliterated. This was information in the records that had actually been supplied to the public body when it had originally been collected.

Efforts to mediate this matter were successful. The public body involved became aware of orders by the Ontario Information & Privacy Commissioner that found it absurd to deny an applicant access to information that he or she had initially supplied to authorities, and the records were subsequently released in their entirety.

The issues raised in this case, and the complexity and intertwined nature of the information contained in its files, led the public body to strike a working committee of senior managers to review the manner in which it prepared records for disclosure. The committee invited the Commissioner's office and the Records Manager to work together in developing new guidelines for reviewing records responsive to access requests that contain a great deal of third party information.

It is expected that the work of the committee will result in guidelines the department can follow in handling complex access requests. Although the work of the committee relates to requests that may be unique to this public body, the Commissioner has urged the department to modify the guidelines so they can be shared more broadly by including them in the government's ATIPP Manual.

... any possible clarification of the request might help to focus the search and produce results more quickly.

13(2) Despite clause (1)(c)(i), a public body may refuse to confirm or deny the existence of

(a) a record referred to in section 19.1,

(b) a record containing information described in section 19 or section 19.1, or

(c) a record containing personal information about the applicant or a third party.

Does the record exist?

Section 13(2) of the *ATIPP Act* was relied on by several public bodies in responding to Access Requests in 2004.

Section 13(2) is a discretionary provision permitting the public body to refuse to confirm or deny the existence of records containing law enforcement information or personal information. The use of this exception requires the public body to determine whether the record, if it exists, contains law enforcement information or personal information about the applicant or a third party, and whether circumstances justify the refusal to confirm or deny the existence of the record.

The use of section 13(2) is discretionary because it states: " ... the public body *may* refuse to confirm or deny the existence of a record." It is the Commissioner's view that "the exercise of discretion by a public body in making decisions under the *Act* must take into consideration the purposes of the *Act*."

To justify its decision to apply section 13(2) to the applicant's request for records, the public body must provide evidence that it took into consideration relevant factors, including public accountability and its responsibility to protect personal privacy. Another factor the public body must consider is the requirement of section 10 of the *Act*, which is to assist the Records Manager in responding to the applicant openly, accurately and completely.

In one instance, an applicant requested access to their own personal information in a record related to an internal workplace investigation. The public body refused to confirm or deny the existence of the record being sought, despite having previously shown the applicant the record during the course of the investigation.

At inquiry, the Commissioner determined that the use of section 13(2) was not justified in this instance. He stated: "[the] response by the public body not only confirms the existence of draft reports, but also acknowledges the Applicant's awareness that such records exist. I therefore find that any basis for applying section 13(2) is effectively removed. The public body cannot refuse to confirm or deny the existence of a record it has previously shown to the applicant as part of the investigation process."

In this case, the public body failed to meet the burden of proof since it did not demonstrate ***why*** it should refuse to disclose whether the records exist. The public body applied section 13(2) as if it simply had a right to do so when records relate to workplace investigations.

At inquiry, the Commissioner determined that the public body failed to meet the burden of proof under section 54(1) in demonstrating that the Applicant had no right of access to the records on the basis of applying section 13(2). Accordingly, the public body could not refuse to confirm or deny the existence of the records. In his Report after Review, the Commissioner stated: "It would be contrary to the purposes and overall intent of the *Act* for a public body to refuse to confirm or deny the existence of a record without some supporting rationale for its decision."

Views and opinions — whose personal information is it?

One Request for Review completed in 2004 dealt with the definition of personal information — whether opinions expressed about a person constitute the personal information of the author of the opinions, or of the person the opinions are about.

The *ATIPP Act* defines "personal information as follows:

> *"personal information" means recorded information about an identifiable individual, including*
>
> *(h) anyone else's opinions about the individual, and*
>
> *(i) the individual's personal views or opinions, except if they are about someone else.*

The public body refused access to a letter containing personal information about the applicant. The letter was written by a third party, who expressed views and opinions about the applicant. Both the author of the letter and the applicant were employees of the same public body. In his Report after Review, the Commissioner stated: "In the case at hand, any personal views or opinions expressed by the Third Party about the Applicant in the letter is the personal information of the Applicant, not of the Third Party."

The Commissioner determined that any personal information in the letter about the third party could be reasonably separated or obliterated and that the remainder should be released to the applicant. The Commissioner was of the opinion that where views or opinions are recorded about someone, this information is not the personal information about the author, but rather the personal information of the individual the views or opinions are about.

The applicant appealed the public body's subsequent decision not to release the information despite the Commissioner's recommendation. The Yukon Supreme Court confirmed the Commissioner's interpretation, and ordered the public body to release those parts of the record containing views and opinions about the applicant.

Disclosure harmful to intergovernmental relations

An applicant requested access to the agenda and minutes of federal/provincial/territorial committees and meetings of medical directors at which Yukon Territorial Government had representation. The public body denied access on the basis of section [illegible]0 of the *ATIPP Act*.

In his review, the Commissioner found that discussions at the meetings were of a nature that would reasonably form an expectation of confidentiality. He was persuaded of the requirement for representatives to engage in the kind of open dialogue that matters under discussion could be debated thoroughly without undue influence that public disclosure of the discussion could bring. Disclosure could therefore reasonably be expected to harm intergovernmental relations by inhibiting the openness of future discussions, which the public body clearly identified as desirable. The records in question were received by the public body in confidence and had been incorporated into the records management system of the department in a way intended to respect the confidentiality of the information.

The Commissioner affirmed that the public body should continue to refuse access, except information about the identity of the participants at the meetings, which he determined would not be harmful to intergovernmental relations.

... where views or opinions are recorded about someone, this information is not the personal information about the author, but rather the personal information of the individual the views or opinions are about.

48(3) A person about whom a public body has in its custody or control a record of personal information may request the commissioner to review their complaint that the public body has not collected, used, or disclosed the information in compliance with this *Act*.

In another case, an applicant requested access to communication contained in letters between the Yukon Territorial Government and a First Nation. The communication related to First Nation land development plans which the applicant believed might affect placer claims. Access was denied by the public body under section 20(1)(iii).

At review, the Commissioner agreed that a reasonable consequence of disclosure could be a breakdown of the trust relationship expected to exist between governments for the purpose of a free expression of views. This could lead to future reluctance to no longer provide similar information. The Commissioner therefore concluded that disclosure could reasonably be expected to harm intergovernmental relations and determined the public body was authorized, but not required, to refuse access.

To properly exercise its discretion in deciding whether to disclose, despite its authority to withhold the information, the public body was under an obligation to consider relevant factors such as the applicant's interests and the purposes of the *ATIPP Act*. In his Report after Review, the Commissioner recommended that the public body reconsider its decision to refuse access and take all relevant factors into consideration.

The public body responded to the recommendation by saying it reconsidered its decision but it still decided to refuse access.

Improper disclosure

The issue of privacy protection arose during a government-wide investigation in 2003 into computer misuse. The office received one request to review a complaint that an employee's personal information was used in contravention of the *ATIPP Act*.

The requester complained that information related to employment history and conduct, as recorded in the investigation files, had been improperly collected, used or disclosed. The complaint specifically related to a decision by the Public Service Commissioner and the Deputy Minister of the employee's department to share this personal information with all the deputy ministers of government sitting as the Deputy Ministers Review Committee (DMRC), for the purposes of administering discipline.

The DMRC provides deputy ministers and presidents of crown corporations with a forum to discuss corporate management issues and proposals with major policy or operational implications. The employee argued that the administration of discipline falls within the responsibility of an individual Deputy Minister, not a body like the DMRC.

In his review of the complaint, the Commissioner concluded the collection and proposed use of the personal information was in accordance with the *ATIPP Act*. However, the disclosure of the personal information to the members of the DMRC he found to be an extraordinary and secondary use that was not for a consistent purpose.

The definition of consistent purpose in the *ATIPP Act* sets two conditions. The use must have a reasonable and direct connection to the purpose for which the information was collected, and the use must be necessary for performing the statutory duties or operating an authorized program of the public body. The Commissioner found the first condition had been met, but the second had not. On review,

he also found no evidence that the public bodies had considered the privacy protection principles in the *ATIPP Act* in making the decision to share the personal information from the individual investigation files with the DMRC.

A detailed explanation of the Commissioner's reasons was provided to the parties in his Report after Review. In this case he also took the unprecedented step of posting a summary of his report on the office web site. The issues raised in the review, his findings, and the public bodies' responses to his recommendation, were all significant in the context of the administration of the *Act*. It was therefore important, in his view, to share the discussion more broadly.

There is a serious consequence when personal information is improperly disclosed – it is impossible to reverse. However, the only action the *Act* authorizes the Commissioner to take is to recommend what change a public body should make in its conduct to avoid using or disclosing the information in contravention of the *Act*. In this case, he recommended that the public bodies adopt and put into practice a Privacy Impact Assessment process to manage the collection, use and disclosure of personal information. He makes this recommendation routinely when he finds there has been a breach of privacy.

The Privacy Impact Assessment is a self-assessment tool that is used by governments throughout Canada as a way to ensure there is adequate protection of the personal privacy of individuals whose personal information is in the custody or under the control of a public body. In fact, at the federal level, the Treasury Board of Canada has implemented a policy that no funds will be released for proposed programs involving the handling of personal information before a Privacy Impact Assessment is submitted to the federal Privacy Commissioner for review and comment.

The Commissioner finds that Yukon public bodies are reluctant to adopt a process of routinely completing privacy impact assessments. In this case, both public bodies responded with a decision to not follow the recommendation. The public bodies rationalized their decisions by expressing the view that the disclosure was justified in the circumstances.

Unlike decisions about access to information, there is no right of appeal to the courts in relation to a public body's decision to refuse to follow a recommendation related to the Commissioner's finding of a privacy breach. The review process is therefore at an end.

The responses of the Public Service Commissioner and the Deputy Minister of the operating department have reinforced an opinion expressed in the Commissioner's Report after Review:

> *The ATIPP Act was introduced in 1996. Despite the eight years of experience with the legislation, I continue to see evidence at times that its principles and requirements have not found their way into the day-to-day application of public administration.*

... Yukon public bodies are reluctant to adopt a process of routinely completing privacy impact assessments.

The point in asking these public bodies to conduct a Privacy Impact Assessment is to encourage its use as a standard process whenever there is a potential impact on the protection of personal information. Taking this step, in the Commissioner's opinion, is the only method of ensuring there has been a proper and full consideration of the *Act's* principles and purpose.

... I continue to see evidence at times that the principles and requirements of the Act have not found their way into the day-to-day application of public administration.

Providing a timely and proper response

One access request in 2004 became the subject of an investigation under section 42(b) of the *ATIPP Act*. This section allows the Commissioner to "receive complaints or comments from the public concerning the administration of the *Act*, conduct investigations into those complaints and report on those investigations."

In this case, the complainant had filed a request for access to records in January 2004. The public body initially sought a time extension until March to complete a records search and prepare a response. An incomplete response was provided in June, three months beyond the extension date by which a response should have been received. After inquiries from the complainant and consequent consultations with the public body in August, the ATIPP office advised that a response to a portion of the request would not be available until December or January of the following year.

At this point, the matter was brought to the Commissioner. A preliminary investigation revealed the applicant had at no time received a response that met the requirements of section 13(1) of the *Act*, and that no further requests for time extensions to prepare a response had been made by the public body or granted by the Records Manager. Furthermore, discussions with the Records Manager and the public body indicated that other access to information requests were in the same situation.

In the view of the Commissioner, these findings indicated a systemic problem with the administration of the *Act*, and he subsequently produced an investigation report. The report reviewed and commented on the facts, and concluded with the Commissioner's interpretation of the various sections of the *Act* related to receiving and administering access requests.

The public body subsequently took several steps to improve its own response to requests for access to records. It reviewed all outstanding applications and sought time extensions for those to which it had not yet responded, it contracted additional help to assist with the review of records and, as mentioned previously, it established a committee to develop guidelines for dealing with requests involving records with third party personal information.

Security of Personal Information

Through the expression of public concern in the media about the potential loss of personal information in laptop computers stolen from the offices of Community Corrections, the Commissioner invoked the general powers provision of the *Act* to conduct an investigation.

Section 42 of the *ATIPP Act* authorizes the Commissioner to conduct investigations into complaints or comments from the public concerning the administration of the *Act*. One of the purposes of the *Act* is to protect personal privacy. Public bodies are under an obligation to protect personal information by making reasonable security arrangements against such risks as accidental loss and unauthorized access.

The Commissioner decided to conduct an investigation into the loss of two laptop computers that contained the personal information of adult probation clients, to determine what measures were in place to protect personal privacy before the break-in to the offices, and what measures the department has taken or proposed in response to this event.

The approach to the investigation was to gather sufficient information to understand the department's response, and to recommend any appropriate additional steps to enhance security measures. The Commissioner would then make an independent assessment about the adequacy of the department's measures and report on the outcome.

The investigation revealed the department had taken steps in 2000, when the premises were acquired, to renovate to standard specifications for the security of sensitive information such as personal information on client files. Standard operating procedures for working with both paper and electronic records were in place, including password protection for access to information in the office computer workstations and the laptop computers.

The methods used to gain entry to the offices during the break-in were considered by the department to be extraordinary, and the building was not designed with that level of security in mind. The Commissioner agreed with this assessment.

Despite the existence of reasonable measures to secure the personal information in this office prior to the break-in, the department's response included 19 steps that were either taken immediately or that it proposed to take, to enhance both physical security and operating procedures. The Commissioner found that the measures were appropriate and he continues to monitor their implementation.

42. In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is responsible for monitoring how this *Act* is administered to ensure that its purposes are achieved, and may

(b) receive complaints or comments from the public concerning the administration of this *Act*, conduct investigations into those complaints, and report on those investigations;

Government's Response to the 2003 Annual Report

64.(1) A public body may prescribe categories of records that are in its custody or control and are available to the public without a request for access under this *Act*.

In my last annual report I expressed concern about the extent to which government is meeting the purposes and intent of the *ATIPP Act*. I included a list of changes that, in my view, would lead to a real and noticeable difference in meeting the objective of openness and transparency as expressed in the purposes of the legislation.

At the time of preparing this report I have seen no response, either to my office or publicly, to these recommendations. I therefore repeat them here, as follows:

- Develop, update and maintain the ATIPP Manual to make it a primary source of information for the administration of the *Act*.
- Raise the profile of the Records Manager and provide sustained support to bring the position to a level at which it can be recognized as the centre of expertise on the administration of the *Act*, particularly regarding requests for access to information. Continuity in staffing is essential.
- Institute an annual reporting process, by the ministry responsible, on the administration of the *Act*. Other jurisdictions have a mandate to do so in their legislation; however, it would be a positive, proactive, step to do so in Yukon even in the absence of a prescriptive requirement in the *Act*.
- Include in the performance measurement for all Deputy Ministers the extent to which the principles of the *Act* are understood and put into practice.
- Invest in the competence and expertise of departmental ATIPP Coordinators by making funding available for training, including the University of Alberta on-line course of study for access and privacy specialists.
- Develop a minimum job description standard to reflect the role and responsibilities of ATIPP Coordinators.
- Designate ATIPP Coordinators at a level in departments that permit them to have meaningful input into decisions made under the *Act*.
- Encourage departments to identify and publish categories of records available to the public by way of routine disclosure, as contemplated by section 64 of the *Act*.

Privacy Impact Assessments

As mentioned elsewhere in this report, the general powers provision of the *ATIPP Act* gives the Commissioner responsibility for monitoring how the *Act* is administered to ensure its purposes are achieved. One of the ways for the Commissioner to do this is to "comment on the implications for protection of privacy of existing or proposed legislative schemes or programs of public bodies."

A Privacy Impact Assessment (PIA) template has been developed by the Office of the Information and Privacy Commissioner to assist public bodies in reviewing the impact that a new scheme or program may have on the protection of personal privacy. The process of completing a PIA is designed to ensure the public body evaluates the program or scheme for compliance with the *Act*. It involves a thorough analysis of the potential impacts the proposal may have on privacy and a review of how these impacts can be justified or mitigated.

The Commissioner will not "approve" a PIA submitted by a public body. The intent is to ensure the project sponsor has assessed the implications of any new program or scheme and has the legal authority to proceed with the project. The Commissioner will comment, when necessary, after reviewing the PIA if it is found that either the legislative authority is unclear or missing, or the impact on privacy is not addressed, or is significant, or is not mitigated, or outweighs the benefits of the program or scheme. If the Commissioner provides comments to the public body, it is up to the public body to accept the comments and provide clarification or proceed without further review by the Commissioner.

It is the Commissioner's view that a Privacy Impact Assessment is rarely ever finished. It is a dynamic document which will be updated from time to time as changes are contemplated for the program. It is expected that a public body will advise the Commissioner's office of any changes or modifications of the program and provide documentation so that the assessment on file is always updated.

All public bodies are encouraged to complete a Privacy Impact Assessment when introducing new programs, policy or guidelines, or modifying existing ones, where personal information is being collected, used or disclosed.

Completing a Privacy Impact Assessment involves a thorough analysis of the potential impacts a proposal may have on privacy and a review of how these impacts can be justified or mitigated.

ATIPP Act Amendments

The office of the Information and Privacy Commissioner has, for over eight years, conducted reviews of decisions made by public bodies under the *Act* and monitored the administration of the *Act* under the general powers provisions set out in section 42. This places the office in a unique position to speak with some authority on the *Act's* shortcomings and to make recommendations for amendments.

The following is a list of proposed amendments that, in our view, would correct errors in legislative drafting, and would strengthen the *Act* as overarching legislation for government programs and activities:

1. Clarify the definition of a 'public body', as originally intended, including a Schedule listing public bodies.

2. Expand the scope of the *Act* to include municipal governments and custodians of personal health information.

3. Establish criteria for designating agencies as a 'public body', ie. that government appoints the majority of members; that the majority of funding is from government; or that government holds controlling interest of the entity's share capital.

4. Amend the review provision in section 48 giving the Commissioner authority to review any decision, act or failure to act that relates to an access request or a request for the correction of personal information in a record, and any matter that could be the subject of a complaint under section 42.

5. Clarify the burden of proof provisions for inquiries in section 54.

6. Give authority to the Commissioner, in a Report after Review, to recommend that a duty imposed by the *Act* or regulations be performed by a public body.

7. Give authority to the Commissioner to conduct audits of public bodies under section 42.

8. Remove the time limit for asking for a review when there has been a 'deemed refusal' under section 49(2).

9. Give the Commissioner discretionary authority to refuse or discontinue a review on the basis that the matter is frivolous, vexatious or is sought on irrelevant grounds.

10. Correct a drafting error in section 48 to include a right of review related to third party business information.

11. Correct a drafting error in section 59 to include a right of appeal related to third party business information.

12. Correct a power imbalance between government and an individual applicant by giving the Commissioner authority to appeal if the person who has the right of appeal has given consent.

13. Amend section 32 so that public bodies must give written notice, to an individual requesting correction of personal information in a record, that a correction or annotation has been made.

14. Provide for the suspension of the time frame for responding to an access request for the purpose of dealing with a response to an estimate of fees, or a request for a waiver of fees.

15. Permit a waiver of fees if disclosure is in the public interest.

16. Include a legislative requirement for periodic reviews of the *Act*.

Review of the *ATIPP Act*

Unlike information and privacy legislation in other Canadian jurisdictions, the Yukon's *Access to Information and Protection of Privacy Act* includes no specific requirement for reviews at periodic intervals. As the oversight authority for the administration of the *Act*, I find this omission a serious obstacle to maintaining the *Act's* effectiveness in guiding public bodies toward the goal of openness and accountability. Some of the obvious reasons are:

- errors in the drafting of the legislation have not been corrected;
- the intent of some provisions have not been clarified;
- procedures in the administration of the *Act* have not been properly linked;
- the scope and reach of the *Act* has not been clearly defined for its original purpose, and its future purpose is urgently in need of review because of the pressing need for expanded personal health information privacy protection; and
- the legislation has not kept pace with technological changes in the handling of personal information.

As Information and Privacy Commissioner, with general responsibility for monitoring how the *ATIPP Act* is administered to ensure its purposes are achieved, I have a special interest in bringing about the best possible results from this review. It is in this context that I wrote to the Minster responsible for the *Act* about how the review of the *Act* might be carried out. I was concerned that the review would be an internal one, meaning that government itself would define the scope of the review and focus on issues that would primarily serve its own interests.

The *ATIPP Act* is about transparency and public accountability. It follows then, in my view, that the review process should also be as open and transparent as possible. I urged the Minister to consider generating public interest in this review so community stakeholders may be heard and have meaningful participation.

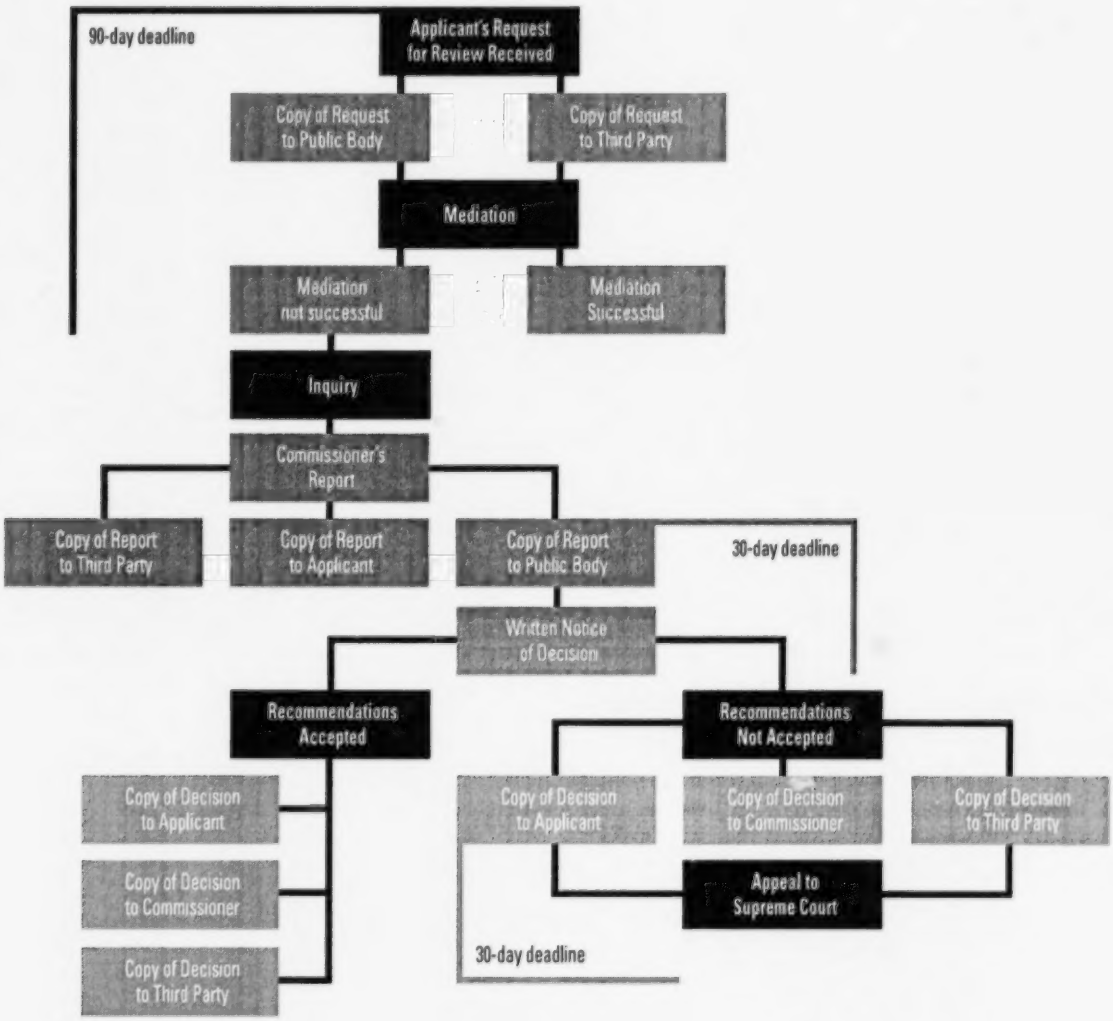
On May 12, 2005, the Minister responsible for the *Act* made the following comments on the review of the *ATIPP Act* in the Legislative Assembly:

> *[The ATIPP Act], like Swiss cheese, is full of holes. I would also like to state that ATIPP legislation provides two primary purposes: one is to provide access to information; the other one is to protect one's personal privacy.*
>
> *The ATIPP Act attempts to strike a balance between the access to government records and the protection of personal privacy. Any future changes to the Act must ensure that the right balance is maintained and that personal privacy is not compromised in efforts to become more open.*
>
> *The [Act] will not undergo a formal review at this time. In the short term, the government will focus on a number on non-legislative options, such as providing training for staff to enable them to provide better and more consistent service, reinforcing the principle of readily releasing information that is already in the public domain instead of making applicants go through the ATIPP process, and seeking input from internal and external stakeholders on other non-legislative options.*
>
> *In the longer term, the government will continue to develop a plan for the future review of the Act. Many of the issues are very complex and require significant planning time and research before legislative options can be presented to stakeholders. A number of other jurisdictions are reviewing the ATIPP legislation similar to the Yukon, and we would like to sit and wait to see what comes out of their particular jurisdictions and what they're experiencing before embarking on our own process.*

Reviews in other Canadian jurisdictions have now been completed. I have been assured my office will be included in the plan for a future review of the *Act*. In the interests of improving the efficiency and effectiveness of the *ATIPP Act*, I urge the government to move forward with the review as quickly as possible.

The ATIPP Act is about transparency and public accountability.

Request for Review Flow Chart



Statistical Summaries

ATIPP FILES BY LEGISLATION

SECTION OF THE *ACT*	DESCRIPTION	OPENED IN 2004
42(b)	General powers to receive complaints or comments from the public concerning the administration of the *Act*, conduct investigations into those complaints, and report on those investigations.	3
42(c)	General powers to comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.	3
48(1)(a)	Request for a review of a refusal by the public body or the records manager to grant access to the record.	5
48(1)(b)	Request for a review of a decision by the public body or the records manager to separate or obliterate information from the record.	2
48(3)	Request for a review of a complaint that a public body has not collected, used or disclosed information in compliance with the *Act*.	4
49(2)	Request for a review of a refusal by the public body or the archivist to grant access to the record (48(1)(a)) based on a deemed refusal upon the failure of the records manager or of a public body to respond in time to a request for access to a record.	2

S.48 REQUEST FOR REVIEW

Brought forward from 2003		15
Received in 2004		13
Community Services	3	
Energy, Mines and Resources	1	
Environment	1	
Health and Social Services	4	
Justice	3	
Public Service Commission	1	
TOTAL		**28**
Completed in 2004		22
To inquiry	12	
Successfully mediated	6	
Discontinued	4	
Carried forward to 2005		6

S.42(b) COMPLAINTS

Brought forward from 2003		3
Received in 2004		3
TOTAL		**6**
Completed in 2004		2
Investigated	2	
Carried forward to 2005		4

ATIPP REQUESTS FOR INFORMATION

TOTAL	**56**